FILED

98 1820 MAY 7 1999

OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

OCTOBER TERM 1999

JAMES SPANGLER, DONALD MELCHER, WAYNE J. BIELEFELDT, ET AL.,
Petitioners,

v.

ALTEC INTERNATIONAL LIMITED PARTNERSHIP, CHART INDUSTRIES, INC. and ALTEC INTERNATIONAL LIMITED PARTNERSHIP PENSION PLAN AND TRUST FOR HOURLY EMPLOYEES,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

George H. Senteney
Kenan J. Kersten
Attorneys for Plaintiffs-Appellants-Petitioners

PRAIRIE GROUP TRIAL LAWYERS S.C.
U.S. Bank Place, First Floor
201 Main Street
La Crosse, WI 54601
Telephone: (608) 784-8900
Facsimile: (608) 784-8901

KERSTEN & McKINNON, S.C.
231 West Wisconsin Avenue
Milwaukee, WI 53203
Telephone: (414) 271-0054
Facsimile: (414) 271-7131

TABLE OF CONTENTS

APPENDIX A: Opinion of Seventh Circuit affirming the District Court ..... App. 1

APPENDIX B: Order of the Seventh Circuit denying petition for rehearing ..... App. 10

APPENDIX C: Opinion and Order of District Court granting summary judgment ..... App. 12

APPENDIX D: Opinion and Order of District Court granting Defendants' motion opposing Court's retention of supplemental jurisdiction ..... App. 24

APPENDIX E: Judgment of the District Court ..... App. 29

APPENDIX F: Seventh Circuit Brief of the plaintiffs-appellants ..... App. 31

APPENDIX G: Amended Complaint ..... App. 49

APPENDIX H: Excerpts from Seventh Circuit Brief of Defendants-Appellees ..... App. 71

APPENDIX I: Petition for Rehearing ..... App. 75

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 98-2437

JAMES SPANGLER,
DONALD MELCHER,
WAYNE J. BIELEFELDT, *et al.*,

Plaintiffs - Appellants

v.

ALTEC INTERNATIONAL
LIMITED PARTNERSHIP,
CHART INDUSTRIES,
INCORPORATED, and
ALTEC INTERNATIONAL
LIMITED PARTNERSHIP
PENSION PLAN AND
TRUST FOR HOURLY
EMPLOYEES,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 97 C 338 – **Barbara B. Crabb**, *Judge*

App. 2

ARGUED DECEMBER 16, 1998
DECIDED FEBRUARY 9, 1999

Before ESCHBACH, COFFEY and MANION, *Circuit Judges.*

ORDER

A group of current and former Altec International employees sued Altec International and associated parties, alleging, in part, that Altec representatives had, in violation of the Employee Retirement Income Security Act ("ERISA"), misrepresented how the employees' pension benefits would be calculated if they came to work for Altec. The district court ruled that ERISA's statute of limitations barred these claims. The employees now appeal. We conclude that the asserted ERISA violation occurred, if at all, when the employees accepted employment with Altec, thus making the employees' claims untimely. Therefore, we affirm.

Background

The plaintiffs-appellants are eighteen former and current employees of Altec International Limited Partnership, formerly known as Albraze, which is owned or controlled by Chart Industries, Inc., and Arthur Holmes (collectively, "Altec"). Prior to working for Altec, each of the employees worked for Trane Co. in its brazed aluminum manufacturing plant. In 1986, Trane sold this plant to two individuals affiliated with Chart Industries and Altec, and agreed to "loan" the plant's employees to Altec for two years, which meant they would return to Trane with full

seniority and benefits.

While the sale was still being negotiated, representatives of Altec began attempting to persuade the employees of the brazed aluminum plant to leave their jobs at Trane and permanently join Altec when it purchased the plant. In 1985 and 1986, Altec representatives assured the employees that they would "not lose anything" from their Trane benefits. They spoke to the employees and distributed documents comparing Trane's and Altec's benefits. According to the employees, on several occasions Altec representatives went so far as to promise them that they would not lose any benefits to which they would have been entitled had they remained with Trane. Eighteen employees transferred to Altec between 1986 and 1988.

The benefits to which Altec said these employees were entitled fell short of the employees' expectations. Upon retirement, the former Trane employees would be entitled to a Trane pension based on their years at Trane (those pensions had already vested by the time they left) and an Altec pension based on their years at Altec. It turns out that these two pensions are not equivalent to a single Altec pension[1] based on the total number of years worked for both companies. The disparity arises primarily because the pension multiplier (monthly benefit per year worked) on the Trane pensions was frozen at $16 or $17 (depending on when the employee transferred), while pension multipliers applied to the total time served at Altec (as of 1990) have increased to $25. The employees believe that Altec should

---

[1]Nor presumably to a single Trane pension. The record, however, contains no indication of what the employees would have received had they stayed at Trane.

supplement their Trane pensions to cover the difference. Altec, however, has not included the employees' time with Trane in its calculation of the employees' years of service for purposes of their Altec pensions.

In 1986, Altec distributed documents to its employees (including those formerly employed by Trane) detailing how their pension benefits would be calculated, which made clear that only years worked for Altec would be used in calculating pension benefits. Nevertheless, the employees claim that not until October 1994 did they realize that they would be getting less than they expected. In May of 1997, the employees filed suit alleging various claims under state law, federal common law, and ERISA.

On Altec's motion for summary judgment, the district court found that ERISA preempted the employees' state law claims of fraudulent representation, breach of contract, intentional misrepresentation, negligent misrepresentation, and strict responsibility misrepresentation. The court, however, declined to grant summary judgment on the employees' remaining state law claims for vacation pay, although the court later relinquished jurisdiction over that set of claims. As for the federal claims, the court concluded that the employees' federal estoppel and denial of benefits claims had no merit because they were based on oral representations that contradicted the written terms of Altec's pension plan. Finally, the court held that ERISA's statute of limitations barred the employees' federal breach of fiduciary duty/intentional misrepresentation claims. The statute of limitations decision is the only issue on appeal.

Analysis

This court reviews a district court's grant of summary judgment de novo, construing the evidence and the inferences drawn from it in the light most favorable to the non-moving party. *See Curran v. Kwon*, 153 F.3d 481, 485 (7th Cir. 1998). Summary judgment is appropriate where there is no genuine issue of material fact such that judgment is proper as a matter of law. *See id.* (citing Fed. R. Civ. P. 56(c)).

Under ERISA, employers that administer pension plans are fiduciaries who owe a duty of loyalty to plan participants and beneficiaries. The Supreme Court has recognized that intentionally misrepresenting the nature of pension plan benefits is a breach of an employer's fiduciary duty, and therefore a violation of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). *Varity Corp. v. Howe*, 516 U.S. 489 (1996). Claims asserting a breach of fiduciary duty are subject to ERISA's statute of limitations, which, in relevant part, provides that a claim is barred either six years after "the date of the last action which constituted a part of the breach," or three years after "the earliest date on which the plaintiff had actual knowledge of the breach," whichever occurs first. ERISA § 413, 29 U.S.C. § 1113.[2]

---

[2]ERISA § 413 reads:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of–
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(continued...)

The district court concluded that the "last action which constituted a part of the breach" occurred in 1985 or 1986 when the representations were made, and therefore, the employees' claims, filed in 1997, were untimely under ERISA § 413's six-year statute of limitations. On appeal, the employees' argue that Altec did not breach its fiduciary duty until it began to deny the former Trane employees benefits to which the employees believed they were entitled. The idea is that only when Altec actually failed to perform was the breach complete. According to this reasoning, the statute of limitations did not begin to run until at least October 1994, when the first former Trane employee retired.

Although there is no case law on the application of ERISA § 413's six-year statute of limitations to what we will refer to as a *Varity* breach of fiduciary duty claim, it is relatively clear that the employees' arguments are misguided. Intentional misrepresentation, which is the sole basis for the breach of fiduciary duty claim, is a tort action, not a contract action; thus, contrary to the employees' protestations, failure to perform is not a necessary element of the cause of action. A plaintiff alleging intentional misrepresentation has a viable cause of action when he or she acts in reliance on the

---

[2](...continued)

> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113 (1994). The employees do not argue that this case involves an omission, and they concede that the case does not involve fraud or concealment.

defendant's misleading statements. *See Librizzi v. Children's Mem'l Med. Ctr.*, 134 F.3d 1302, 1307 (7th Cir. 1997) (suggesting this possibility in dicta). The timing of the injury caused by such representations is irrelevant. In analogous ERISA cases, courts have uniformly recognized that the fact that an injury may not be felt for many years does not mean that a violation or breach has not yet occurred. *See id.* At 1306 ("An adverse decision whose effect is deferred gives rise to a claim when the decision is made, not when the effect is felt."); *Larson v. Northrop Corp.*, 21 F.3d 1164, 1169-72 (D.C. Cir. 1994) (holding that breach of fiduciary duty under ERISA was complete when defendant illegally terminated pension plan, rather than when defendant failed to pay benefits); *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1178 (3d Cir. 1992) (holding that last act constituting a breach of fiduciary duty under ERISA occurred when defendant illegally amended pension plan, rather than when defendant failed to pay benefits); *International Union of Elec., Elec., Salaried, Mach. & Furniture Workers v. Murata Erie N. Am., Inc.*, 980 F.2d 889, 898-900 (3d Cir. 1992) (same). *See also Wolin v. Smith Barney Inc.*, 83 F.3d 847, 854-55 (7th Cir. 1996) (discussing the relationship between discovery of breach and discovery of injury under ERISA). It is likewise clear that ERISA § 413's six-year statute of limitations begins to run when the violation or breach occurs, regardless of when the injury is felt. *See Larson*, 21 F.3d at 1169-72; *Gluck*, 960 F.2d at 1178; *Murata*, 980 F.2d at 898-900.

Accordingly, in a *Varity*-type breach of fiduciary duty situation, the "last action which constituted a part of the breach" occurs when the employee takes an irrevocable action in reliance on the fiduciary's misrepresentations. The district court's opinion suggests, to the contrary, that the last

act of misrepresentation is the correct starting point. Actual inducement, however, is typically considered an element of intentional misrepresentation. W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* 728 (West, 5th Lawyers ed., 1984). Moreover, a plaintiff has no injury until he detrimentally relies on the misrepresentations, and therefore, and ERISA cause of action would accrue only upon such reliance. Applying ERISA § 413 in this manner, the statute of limitations began to run for each employee's *Varity* claim on the day he agreed to transfer from Trane to Altec. Because the last transfer occurred in 1998, ERISA § 413 bars all of the employees' *Varity* claims.

While the employees insist that they are pursuing only their *Varity* claims on appeal, they repeatedly suggest that the alleged misrepresentations were originally promises that gave rise to a contractual right, the breach of which was not complete until Altec failed to pay according to the employees' expectations. As noted above, however, a *Varity* claim is a tort-based claim not a contract-based claim, and therefore, the existence or non-existence of a contractual right has no bearing on the employees' *Varity* claims. To the extent that the employees' are arguing that Altec is liable under ERISA for failing to perform on its promises, they are actually taking issue with the district court's dismissal of their ERISA § 502(a)(1)(B) denial of benefits claims - a decision they did not appeal. The district court, in any event, correctly dismissed those claims because an oral representation that conflicts with the terms of a written plan has no effect. *See Schmidt v. Sheet Metal Workers' Nat'l Pension Fund*, 128 F.3d 541, 546 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1513 (1998). Altec's written plan, distributed to its employees in 1986, makes no mention of an exception for former Trane employees; and thus is in conflict

with the alleged oral promises. Accordingly, the employees cannot base a claim for the denial of benefits on those promises.

In sum, we conclude that ERISA's statute of limitations bars the employees' breach of fiduciary duty claims. Thus, we AFFIRM the district court's ruling.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 98-2437

JAMES SPANGLER,
DONALD MELCHER,
WAYNE J. BIELEFELDT, *et al.*,

Plaintiffs - Appellants

v.

ALTEC INTERNATIONAL
LIMITED PARTNERSHIP,
CHART INDUSTRIES,
INCORPORATED, and
ALTEC INTERNATIONAL
LIMITED PARTNERSHIP
PENSION PLAN AND
TRUST FOR HOURLY
EMPLOYEES,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 97 C 338 – **Barbara B. Crabb**, *Judge*

March 12, 1999

Before ESCHBACH, COFFEY and MANION,
Circuit Judges.

ORDER

On February 23, 1999 the plaintiffs-appellants filed a petition for rehearing. All of the judges on the original panel having voted to deny the petition,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES SPANGLER, DONALD MELCHER, WAYNE J. BIELEFELDT, DALE CHRISTIANSON, ROBERT CLARK, HAROLD DANIELSON, DENNIS A. GERKE, DAVID GOODE, KEITH HUBER, WILLIAM HUTSCHENREUTER, RAY JANISCH, OSWALD A. KLOMSTEN, JERRY MUNYON, EMIL D. POTARACKE, RODERICK SAND, GORDON STENSLIEN, STANLEY STUGEN, and ROBERT TAYLOR,

Plaintiffs,

v.

ALTEC INTERNATIONAL LIMITED PARTNERSHIP, a domestic limited partnership, CHART INDUSTRIES, INC., a Delaware Corporation, and ALTEC INTERNATIONAL LIMITED PARTNERSHIP PENSION PLAN AND TRUST FOR HOURLY EMPLOYEES,

Defendants.

OPINION AND ORDER

97-C-338-C

Plaintiffs are current and former employees of defendant ALTEC International Limited Partnership. In this civil action, plaintiffs contend that defendant ALTEC and defendant Chart Industries, Inc., breached promises made to plaintiffs and made misrepresentations concerning the employee benefits to which plaintiffs would be entitled if they agreed to leave Trane Company and work for Chart. Plaintiffs seek money damages under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461, federal common law and Wisconsin statutory and common law. Jurisdiction is present pursuant to 29 U.S.C. § 1132(f) and 28 U.S.C. § 1331.

The case is before the court on defendants' motion for partial summary judgment on all claims asserted by plaintiffs, with the exception of the vacation pay claims of plaintiffs Goode, Christianson and Huber. Defendants assert that plaintiff's state law claims are preempted by ERISA and that plaintiffs' ERISA breach of fiduciary duty claim is barred by the act's statute of limitations. Furthermore, defendants contend that plaintiffs' estoppel and denial of benefits claims fail because they conflict with written documents describing the plaintiffs' pension plan. Finally, defendants maintain that all of plaintiffs' vacation pay claims, except those of plaintiffs Goode, Christianson and Huber, are barred by Wisconsin's six-year statute of limitations for breach of contract actions. Plaintiffs deny that all of their non-vacation pay claims are governed by ERISA and contend that the applicable limitations periods have not yet expired. Also, plaintiffs assert that their estoppel, denial of benefits and vacation pay claims are all viable.

Defendants' motion for partial summary judgment will be granted in part and denied in part. I find that

plaintiffs' state law claims are preempted by ERISA and that plaintiffs failed to file their ERISA claims within the act's statute of limitations. Plaintiffs' estoppel and denial of benefits claims are unsupported by either facts or law and must be denied. Finally, defendants are not entitled to summary judgment on plaintiffs' vacation pay claims because there is a genuine dispute whether these claims are barred under Wisconsin's six-year statute of limitations for breach of contract actions.

To prevail on a motion for summary judgment, the moving party must show that even when inferences are drawn in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1412 (7th Cir. 1989) (citations omitted). I note that defendants chose to disregard plaintiffs' proposed findings of fact, stating that the preliminary pretrial conference order made no provision for their submission. However, such a document is authorized by this court's standing rules and procedures for summary judgment motions. Therefore, all properly supported facts in plaintiffs' proposed findings of fact will be deemed admitted. For the sole purpose of deciding this motion for partial summary judgment, I find from the parties' proposed findings of fact that there is no genuine dispute with respect to the following material facts.

UNDISPUTED FACTS

Plaintiffs are current and former employees of defendant ALTEC who were employed previously by Trane Company. In 1986, the Trane plant in which plaintiffs

worked was sold to two individuals affiliated with defendant Chart Industries, Inc., and its subsidiary, defendant ALTEC, then known as ALBRAZE, International, Inc.

Plaintiffs left their jobs at Trane to join defendant ALTEC in reliance on ALTEC's promise that they would "not lose anything" from their Trane benefits. Representatives of defendant ALTEC made these assurances in 1985 and 1986.

When plaintiffs accepted employment with defendant ALTEC, their interests in their existing Trane pensions were completely vested. However, because plaintiffs resigned from Trane, their previous years of service with Trane are not included in the years of service to which the pension multiplier is applied at the time of retirement for their ALTEC pensions. In 1985 and 1986, representatives of defendant ALTEC told some of the plaintiffs that ALTEC would pay plaintiffs, upon retirement, the difference between their Trane and ALTEC pensions and the amount they would have received had they stayed at Trane.

In 1986, defendant ALTEC distributed certain documents regarding its benefits program to some of the plaintiffs. These documents described how plaintiffs' pensions from ALTEC would be calculated. Defendant ALTEC did not withhold any of the documents from any of the plaintiffs.

By 1989, plaintiffs, Gerke, Clark, Taylor and Sand knew that their vacation benefits at defendant ALTEC were different from what they would have received had they continued their employment with Trane.

In 1994, plaintiffs began to suspect that their total pension benefits would be less than they had expected. Upon plaintiff Spangler's inquiry, he received a letter in 1995 from a union representative that explained the method of calculation for his pension benefits. This letter referred to a memorandum that allegedly had been given to plaintiffs by defendant ALTEC in 1986. Plaintiffs deny ever seeing the second page of the memorandum, which described how their total pension benefits would be calculated upon retirement.

OPINION

A. ERISA Preemption of State Law Claims

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), preempts any state law claim that relates to a pension plan. See Anderson v. Humana, Inc., 24 F.3d 889, 891 (7th Cir. 1994) (citing District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125 (1992); Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)); see also Andersen v. Chrysler Corp., 99 F.3d 846, 856 (7th Cir. 1996) (citations omitted). A state law claim "relates to" a pension plan "if it has a connection with or reference to such plan." Shaw, 463 U.S. at 96-97. ERISA's board preemption clause establishes pension plan regulation exclusively as a federal concern and ensures that one set of rules applies to all pension plans. See Anderson, 24 F.3d at 891; Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987).

In Anderson, 24 F.3d at 891, the plaintiff alleged that the provider of a health maintenance organization violated state statutory and common laws of fraud and deceptive practices by failing to provide complete information about its benefits plan. The court of Appeals for the Seventh Circuit

held that ERISA preempted these state law claims, because the claims centered around the information given to employees about the benefits provided by an employer's plan. Similarly, the court held that a state common law fraud claim clearly would be preempted by ERISA. See Andersen, 99 F.3d at 856. The court stated that a claim alleging that a plan description is "false and misleading" is properly brought under § 502 of ERISA; 29 U.S.C. § 1132, for a breach of the plan administrator's duty to describe the plan benefits sufficiently. Id.

Plaintiffs assert that the situation is governed by Smith v. Texas Children's Hospital, 84 F.3d 152, 155 (5th Cir. 1996), in which the court held that a claim for "fraudulent inducement" was not preempted by ERISA when the facts were that the plaintiff had quit her job and relinquished her accrued benefits in reliance upon the hospital's misrepresentations that she would enjoy the same benefits in her new job. Even if Smith had precedential value in this circuit, it is factually distinguishable from this case. Smith was suing for benefits already accrued at her former job at the time of her resignation. By contrast, plaintiffs are suing for benefits that had not yet accrued at Trane at the time plaintiffs transferred to defendant ALTEC. They are not seeking to recover the benefits already accrued and vested at the time of their resignations; this amount will be paid to them in their Trane pensions. Rather, plaintiffs are seeking to recover the amount that they would have accrued in their Trane pensions after the time of their transfer to defendant ALTEC had they remained employed by Trane. Moreover, in the Smith case, plaintiff Smith had not been informed that she no longer enjoyed the same benefits as with her former employer; in fact, she was given oral and written assurances to the contrary. See id. at 153. In this

case, plaintiffs were given documents that described how their pensions would be calculated.

Plaintiffs' claims of fraudulent representation, breach of contract, intentional misrepresentation, negligent misrepresentation and strict responsibility misrepresentation each relate to and are connected with plaintiffs' pension plans and fall squarely within ERISA's preemption clause. Therefore, these claims must be dismissed.

B. ERISA Statute of Limitations

Section 413(a) of ERISA, 29 U.S.C. § 1113(a), allows claims of ERISA fiduciary duty violations to be brought only within the earlier of: 1) six years after the last action which constitutes the breach; or 2) three years after the plaintiff had actual or constructive knowledge of the breach. If the defendant attempts to conceal the fact of the breach, the statute of limitations is six years. 29 U.S.C. § 1113(a); see also Radiology Center, S.C. v. Stifel, Nicolaus & Co., 919 F.2d 1216, 1220 (7th Cir. 1990).

Although plaintiffs contend that they did not have actual knowledge of the breach until approximately 1994, the undisputed facts establish that the last actions constituting the breach occurred in 1985 and 1986, when representatives of defendant ALTEC told certain plaintiffs that they would "not lose anything" from their Trane benefits upon transferring their employment to defendant ALTEC. The statute is clear that suit must be commenced by the earlier of six years after the breach or three years after actual or constructive knowledge of the breach. Taking the earlier date, a timely action for breach of fiduciary duty would have to have been commenced in 1992, six years after 1986, the

date of the last action constituting the alleged breach.

Plaintiffs try to demonstrate that the last actions constituting the ERISA violations took place in 1995 by citing Varity Corp. v. Howe, 516 U.S. 489 (1996). Although Varity addresses whether an employer's misrepresentations about the future of its employees' pension plans constitute a breach of fiduciary duty, the case does not provide a basis for finding that plaintiffs' claims are timely. The undisputed facts establish that the alleged misrepresentations all occurred during 1985 and 1986. Plaintiff Spangler's 1995 letter from the union representative cannot be considered an additional breach of defendants' fiduciary duties. The letter neither contained any misrepresentations regarding the calculation of plaintiffs' pensions nor was sent on defendants' behalf.

In the alternative, plaintiffs contend that their claim is timely because defendants engaged in fraudulent concealment, which extends the statute of limitations to six years after discovery of the breach. 29 U.S.C. § 1113(a). To prove that fraudulent concealment occurred, plaintiffs must demonstrate that defendants took active steps to hide the fact of the breach. See Radiology Center, 919 F.2d at 1220. Plaintiffs have failed to show that defendants attempted to hide the terms of its benefits package. In fact, some plaintiffs concede that they received certain documents explaining the benefits package from the defendants. Although some of the plaintiffs may not have understood the terms of their pension plans, defendants' failure to ensure that all employees fully understood their benefits does not constitute fraudulent concealment for the purpose of the ERISA limitations period.

C. Estoppel and Denial of Benefits Claims

Section 502 of ERISA allows a participant or beneficiary of a benefits plan to assert a cause of action to recover benefits due under the terms of the written plan. See 29 U.S.C. § 1113(a)(1)(B). Employers may be estopped from denying such benefits. See Schmidt v. Sheet Metal Workers' Nat'l Pension Fund, 128 F.3d 541, 546 (7th Cir. 1997) (citing Black v. TIC Inv. Corp., 900 F.2d 112, 116 (7th Cir. 1990)). However, employers cannot be estopped from denying benefits due under oral modifications to the written benefits plan. See id.; Plumb v. Fluid Pump Service, Inc., 124 F.3d 849, 856 (7th Cir. 1997). When "the written terms of an ERISA plan do not entitle the claimant to the coverage sought, benefits will not be forthcoming on the basis of oral representations to the contrary." Plumb, 124 F.3d at 856 (citations omitted).

In Schmidt, 128 F.3d at 546, the Seventh Circuit refused to "apply estoppel principles to give effect to oral representations that contradict written Plan terms." The plaintiff's father wanted to change the beneficiary of his pension death benefit so that the plaintiff would be the new beneficiary. After speaking to a benefits analyst, the plaintiff's father filled out the incorrect form for changing beneficiaries. Because oral representations made by the benefits analyst regarding which form was required to switch beneficiaries clearly conflicted with the written plan instructions, the court denied the plaintiff's estoppel claim for his father's pension death benefit. See id.

Similarly, plaintiffs' claims for loss of pension benefits depend solely on oral representations that plaintiffs would "not lose anything" from their Trane benefits. This

oral representation clearly contradicts the written terms of their pension plans. Therefore, defendants are entitled to summary judgment on plaintiffs' claims for estoppel and denial of benefits.

D. Vacation Pay Claims

Claims for vacation pay are not governed by ERISA. See 29 C.F.R. § 2510.3-1(b)(3)(i). Vacation pay claims are governed by Wisconsin's statute of limitations for contract claims. See Green v. Granville Lumber & Fuel Co., 60 Wis. 2d 584, 589, 211 N.W.2d 467, 470 (1973). Claims for breach of contract must be commenced within six years after the cause of action accrues. See Wis. Stat. § 893.43. The cause of action accrues at the moment the contract is breached. See CLL Associates Limited Partnership v. Arrowhead Pacific Corporation, 174 Wis. 2d 604, 607, 497 N.W.2d 115, 116 (1993).

Both parties misinterpret when the applicable statute of limitations begins to run. The six-year limitations period starts when the contract is breached, not when the plaintiffs become aware of the breach. See id. Therefore, the statute of limitations begins running when the vacation benefits are denied. Contracts requiring continuous performance, such as a contract to provide annual vacation benefits, may be breached by a series of partial breaches or by one total, complete breach. See Segall v. Hurwitz, 114 Wis. 2d 471, 491, 339 N.W.2d 333, 343 (Ct.App. 1983) (citations omitted). Accordingly, a series of breaches could have occurred annually, when each plaintiff failed to receive his vacation benefits, or a total breach could have occurred in 1986, when documents were distributed outlining the benefits package. Because both sides failed to address this

issue, summary judgment cannot be granted to defendants.

It is not clear, however, whether plaintiffs can pursue these claims relating to vacation pay. If the claims arise under state law, this court would have no independent jurisdiction over them in the absence of a showing of diversity between plaintiffs and defendants and an amount in controversy in excess of $75,000. 28 U.S.C. § 1332. Although federal courts have jurisdiction to entertain state law claims when they are supplementary to federal law claims and are so related to those claims as to form part of the same course or controversy, see 28 U.S.C. § 1367, the general rule is that courts are to decline to exercise supplementary jurisdiction over such claims when the federal claims to which they are supplementary are dismissed before trial. Van Harken v. City of Chicago, 103 F.3d 1346, 1354 (7th Cir. 1997).

If plaintiffs intend to pursue their vacation pay claims in this court, they should so advise the court and opposing counsel no later than April 24, 1998, and should set forth in writing the reasons for their belief that the claims arise under federal law or, alternatively if they cannot show the claims to be federal in nature, their reasons for believing that the court should not relinquish jurisdiction over the claims.

ORDER

IT IS ORDERED that defendants' motion for partial summary judgment is GRANTED with respect to plaintiffs' claims of fraudulent representation, breach of contract, intentional, negligent and strict responsibility misrepresentations, breach of ERISA fiduciary duty, estoppel and denial of benefits; defendants' motion is DENIED with

respect to plaintiffs' vacation pay claims.

FURTHER, IT IS ORDERED that plaintiffs have until April 24, 1998, in which to advise the court and defendants' counsel whether their vacation pay claims arise under federal law or, if not, why the court should not relinquish jurisdiction over the claims. Defendants may have until May 8, 1998, in which to respond.

Entered this 13th day of April, 1998.

BY THE COURT:

BARBARA B. CRABB
District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES SPANGLER, DONALD MELCHER, WAYNE J. BIELEFELDT, DALE CHRISTIANSON, ROBERT CLARK, HAROLD DANIELSON, DENNIS A. GERKE, DAVID GOODE, KEITH HUBER, WILLIAM HUTSCHENREUTER, RAY JANISCH, OSWALD A. KLOMSTEN, JERRY MUNYON, EMIL D. POTARACKE, RODERICK SAND, GORDON STENSLIEN, STANLEY STUGEN, and ROBERT TAYLOR,

Plaintiffs,

v.

ALTEC INTERNATIONAL LIMITED PARTNERSHIP, a domestic limited partnership, CHART INDUSTRIES, INC., a Delaware Corporation, and ALTEC INTERNATIONAL LIMITED PARTNERSHIP PENSION PLAN AND TRUST FOR HOURLY EMPLOYEES,

Defendants.

OPINION AND ORDER

97-C-338-C

In an opinion and order entered April 13, 1998, I granted defendants' motion for partial summary judgment with respect to all of plaintiffs' federal law claims and directed the parties to advise the court whether it should relinquish jurisdiction of plaintiffs' state law claims. Defendants argue in favor of relinquishing jurisdiction over the remaining claims. In support of retaining jurisdiction, plaintiffs observe that this case has been proceeding in federal court for about a year and that eighteen plaintiffs and two defense witnesses have been deposed. Further, plaintiffs' counsel avers that at least 40 sets of written discovery have been answered and that should this case return to Circuit Court for La Crosse County there is slim chance of obtaining a trial date within the next year and half because of the backlog of cases in that system. Aff. of Timothy Jacobson (Dkt. #67) at ¶¶ 2 and 4. Despite these concerns, I conclude that retention of jurisdiction over plaintiffs' state law claims is inadvisable.

Pursuant to 28 U.S.C. § 1367(c)(3), a district court "may decline to exercise supplemental jurisdiction over" state law claims when it "has dismissed all claims over which it has original jurisdiction." The court should be guided by considerations of "judicial economy, convenience, fairness and comity . . . ." Wright v. Associated Ins. Companies, Inc., 29 F.3d 1244, 1251 (7th Cir. 1994). When all federal claims are dismissed before trial, the general rule is that jurisdiction should be relinquished. Id. However, in "unusual cases," the balance of applicable considerations may weigh in favor of retaining jurisdiction. Id. In Timm v. Mead Corp., 32 F.3d 273, 277 (7th Cir. 1994), the Court of Appeals for the Seventh Circuit discussed one such unusual case, stating:

> Here, by the time the [age discrimination] claim was dismissed, the state law claims were ripe for decision, the applicable state law was straightforward, the litigation was well over a year old, and discovery, which had been at times contentious, was completed. The district court reasonably concluded that there was no need to delay the resolution of this matter (and add to the burdens of the Illinois court system) by having the parties litigate the unspectacular state law issues anew in state court.

Over Timm's objection, the court of appeals found that the district court did not abuse its discretion by proceeding to dismiss his state law claims on their merits after granting summary judgment in favor of the defendant on the federal claims. Id. at 276-277. Retaining jurisdiction is less advisable when the remaining state law claims have not been briefed and argued by the parties; often, this is an indication that there has been little investment of federal judicial resources. See id. at 277 n.2 ("dismissal at pleading stage usually counsels in favor relinquishing jurisdiction"); Wright, 29 F.3d at 1251.

Plaintiffs maintain that this case is analogous to Timm but they overlook a critical distinction. Although the district court retained jurisdiction over Timm's state law claims, doing so served state *and* federal judicial economy because it enabled the district court to dispose of *all* claims in the same motion. Cf. Wright, 29 F.3d at 1251 ("Here there is no suggestion that the district court reached Wright's state-law claims to conserve judicial resources"). There is a reason why district courts are directed to consider the extent to which they have invested judicial resources in a particular case; the objective is to avoid situations in which "sending

the case to another court will cause a substantial duplication of effort." Id. This principle overlaps with the related notion that "judicial economy, convenience, fairness and comity may point to federal retention . . . when it is absolutely clear how the pendent claims can be decided." Id. Relinquishing jurisdiction in this case would not implicate either of these concerns. In the April opinion and order, I did not reach the merits of plaintiffs' state law claims or have any occasion to determine how these claims should be decided. Consequently, there is little for a state court to duplicate and I have no basis for determining the relative complexity or importance of the issues implicated by the state claims. Finally, as observed by defendants, all of the discovery generated in this case may be used in the state court proceedings.

Admittedly, convenience and fairness may weigh on plaintiffs' side given that they have pursued this action for the past year and are within a month of the scheduled trial date. However, these interests are insufficient to overcome the policy considerations militating in favor of restricting the federal courts' exercise of jurisdiction over state law claims.

ORDER

IT IS ORDERED that plaintiffs' state law claims are dismissed without prejudice pursuant to 28 U.S.C. § 1367(c)(3).

Entered this 11th day of May, 1998.

BY THE COURT:

BARBARA B. CRABB
District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES SPANGLER, DONALD MELCHER, WAYNE J. BIELEFELDT, DALE CHRISTIANSON, ROBERT CLARK, HAROLD DANIELSON, DENNIS A. GERKE, DAVID GOODE, KEITH HUBER, WILLIAM HUTSCHENREUTER, RAY JANISCH, OSWALD A. KLOMSTEN, JERRY MUNYON, EMIL D. POTARACKE, RODERICK SAND, GORDON STENSLIEN, STANLEY STUGEN, and ROBERT TAYLOR,

Plaintiffs,

v.

ALTEC INTERNATIONAL LIMITED PARTNERSHIP, a domestic limited partnership, CHART INDUSTRIES, INC., a Delaware Corporation, and ALTEC INTERNATIONAL LIMITED PARTNERSHIP PENSION PLAN AND TRUST FOR HOURLY EMPLOYEES,

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 97-C-338-C

This action came for consideration before the court with U.S. DISTRICT JUDGE BARBARA B. CRABB presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that defendants' motion for partial summary judgment is GRANTED with respect to plaintiffs' claims of fraudulent representation, breach of contract, intentional, negligent and strict responsibility misrepresentation, breach of ERISA fiduciary duty, estoppel and denial of benefits. IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs' state law claims are dismissed without prejudice and this case is CLOSED.

Joseph W. Skupniewitz, Clerk of Court May 12, 1998

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JAMES SPANGLER, DONALD MELCHER,
WAYNE J. BIELEFELDT, ET AL.,

Plaintiffs-Appellants,

v. Appeal No. 98-2437

ALTEC INTERNATIONAL LIMITED
PARTNERSHIP, CHART INDUSTRIES,
INC. and ALTEC INTERNATIONAL
LIMITED PARTNERSHIP PENSION PLAN
AND TRUST FOR HOURLY EMPLOYEES,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin
Case No. 97 C 0338 C
The Honorable Barbara B. Crabb, Presiding

BRIEF OF THE PLAINTIFFS-APPELLANTS

(Tables omitted)

STATEMENT OF JURISDICTION

The jurisdiction of the district court case is based upon 28 U.S.C. sec. 1331 *et seq.*, in that the action is based upon claims for breach of fiduciary duty under ERISA sec. 502(a)(3), to declare and enforce rights under certain employee benefit plans pursuant to ERISA sec. 502(a)(1)(B) ERISA federal common law for estoppel. As to the claims for misrepresentation and breach of contract under state law, jurisdiction was also based on pendant jurisdiction pursuant to 28 U.S.C. sec. 1367.

The jurisdiction of the court of appeals is based upon 28 U.S.C. Sec.1291. The judgement appealed from is final and was entered on May 12, 1998. The filing date of the notice of appeal is June 8, 1998.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district err in its finding that the statute of limitations set forth in Section 413(a) of ERISA, 29 U.S.C. §1113 (1)(A), which allows claims of ERISA fiduciary duty violations to be brought within the earlier of six years after the last action which constituted a part of the breach or violation or three years after the plaintiff had actual knowledge of the breach, had run prior to the commencement of this action?

STATEMENT OF THE CASE

1. Course of Proceedings.

This action was commenced in the United States District Court for the Western District of Wisconsin on May 13, 1997 with claims for breach of fiduciary duty under ERISA §502(a)(3), to declare and enforce rights under certain employee benefit plans pursuant to ERISA §502(a)(1)(B), ERISA federal common law for estoppel, and alternative claims for fraudulent representations under Wis. Stat. §100.18, and breach of contract under state law.

On February 12, 1998, defendants moved for partial summary judgement requesting the dismissal of all claims except those for vacation benefits. After submission of briefs, affidavits and other supporting documents by both sides, the district court granted defendants motion on April 13, 1998 dismissing plaintiffs' federal claims. The district court did so on the basis that the statute of limitations had run before the commencement of this action.

On May 11, 1998, the district court rendered its opinion and order that the district would relinquish its jurisdiction of plaintiffs' remaining state law claims and dismissed the claims without prejudice. On May 12, 1998, Judgement of dismissal was entered.

The plaintiffs filed their notice of appeal on June 8, 1998.

2. Statement of Facts.

The Plaintiffs are a mix of eighteen past and present employees of Altec International Limited Partnership, f/k/a Albraze, which is owned or controlled by Chart Industries, Inc., and Arthur Holmes (hereinafter collectively referred to as "Altec"). Plaintiffs brought this action alleging violations

of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 U.S.C. §1001 *et seq.*, federal common law arising thereunder, and certain state laws. Prior to Altec, Plaintiffs were employed by Trane Company (hereinafter "Trane") as factory workers in its brazed aluminum manufacturing plant known as plant three. (Complaint, ¶1.)

In or about late 1985 and early 1986 Trane desired to sell its brazed aluminum operations. During this time, various meetings were held with Trane employees, including the plaintiffs, regarding Altec's purchase of Trane's brazed aluminum operations and the resulting effect on the existing employees, including the plaintiffs. (hereinafter the "Meetings") (Affidavit of James Spangler, at ¶4.)

Altec needed skilled welders such as Spangler and certain other plaintiffs in order to continue the plant three operations and to train a new generation of welders. Altec was unable to recruit highly skilled welders such as the Plaintiffs elsewhere. (*Id.*, at ¶5.)

The work of several of the plaintiffs as welders involved highly specialized training and skills for performing internal repair of brazed aluminum heat exchangers. Very few companies in the world manufacture such units and said plaintiffs would be sent around the globe to make on-site repairs. (Affidavit of James Spangler, par. 3.)

Plaintiffs were concerned about transferring to Altec. Plaintiffs had many years of service and seniority at Trane and did not want to lose the benefits that went with the many years of continuous service. One or more employees at the Meetings raised the concern whether, upon retirement,

employees would be worse off or lose anything in comparison to remaining with Trane. (*Id.*, at ¶6.)

At the Meetings, George Snapp, Jr., employed in management at plant three and to continue in such capacity for Altec, said that the goal was to see most all of the plant three employees transfer to Altec. Snapp explained that said employees, including the plaintiffs, were critical to the success of Altec. Snapp promised that if the plaintiffs transferred to Altec, the transfer would not take anything away from the plaintiffs; specifically that they would not lose any benefits they would have had if they remained with Trane. (*Id.*, at ¶7.)

Also at the Meetings, Arthur Holmes told the plaintiffs, among other employees, that he would be unable to buy Trane's brazed aluminum operation unless the employees transferred to Altec. Holmes further assured the plaintiffs that should they transfer to Altec, they would have nothing to fear because they would not lose any benefits, and it was going to be just like continuing to work for Trane. (*Id.*, at ¶8.)

At one of the Meetings, the employees present at the meeting were shown by Altec a comparison of benefits between those at Trane and those they would receive if they transferred employment to Altec. (*Id.*, at ¶9.)

On a number of occasions, Holmes walked around the plant three floor encouraging employees, including the plaintiffs, to transfer their employment to Altec. Snapp also walked around the plant floor on numerous occasions telling said employees that they had nothing to worry about by transferring to Altec because they would not lose any of the

benefit of their years working for Trane. (*Id.*, at ¶11.)

Based on the above promises of Altec and the comparison of benefits between Trane and Altec, the employees decided to transfer to Altec. (*Id.*, at ¶13.)

In October of 1994, plaintiff James Spangler (hereinafter "Spangler") spoke to fellow employee and plaintiff Oswald Klomsten (hereinafter "Klomsten") regarding Klomsten's intent to retire. Klomsten requested that Altec calculate his anticipated pension benefits. Klomsten was concerned that the benefits were less than promised by Altec. (*Id.*, at ¶14.)

Based on conversations with Klomsten, Spangler concluded Altec was calculating Klomsten's pension benefits wrong in that his combined Trane and Altec pensions totaled an amount less than had he worked continuously at Trane over the same number of combined years. (*Id.*, at ¶15.)

Spangler contacted union steward Dan Mihalovic regarding Altec's failure to pay benefits as promised. Mihalovic responded by letter of January 13, 1995 (Defendants' Dep. Ex. 4), which referenced a copy of what purported to be the second page of a one page memorandum from Arthur S. Holmes, dated April 15, 1986. (Defendants' Dep. Ex. 5.) The memorandum was provided to Spangler as an explanation as to why the employees who transferred from Trane would lose pension benefits in comparison to Trane employees who did not transfer. Spangler had never seen the alleged "second memo page" before. (*Id.*, at ¶17.)

On March 17, 1995, Spangler met with Arthur Holmes regarding Altec's refusal to pay the benefits Altec

promised. Holmes refused to take any action to rectify the situation. (*Id.*, at ¶18.)

Spangler subsequently discussed his concerns with several fellow Altec employees and was informed by each of them that they too were told that transferring their employment from Trane to Altec would not result in the loss of any benefits, including pension benefits, in comparison to the benefits they would receive had they worked for Trane continuously for the same number of years as their combined Trane and Altec service. Spangler also discussed the alleged "second memo page" with them, and all agreed they had never seen it before. (*Id.*, at ¶19.)

As a result of Altec's failure to pay as promised, the Plaintiffs have suffered a loss of pension, health care, and vacation benefits. (*Id.*, at ¶20.)

Two years and seven months after Altec's failure to pay as promised Plaintiffs commenced this action on May 13, 1997. The plaintiffs filed their complaint with claims for breach of fiduciary duty under ERISA §502(a)(3), to declare and enforce rights under certain employee benefit plans pursuant to ERISA §502(a)(1)(B), ERISA federal common law for estoppel, and alternative claims for fraudulent representations under Wis. Stat. §100.18, and breach of a contract under state law.

SUMMARY OF ARGUMENT

The ERISA statute of limitations requires that plaintiffs commence an action within the earlier of six years after the last action which constituted a part of the breach or violation or three years after the plaintiffs had actual

knowledge of the breach.

The last action which constituted a part of the breach was Altec's failure to perform on their promises to pay benefits as aforementioned. This failure to perform occurred at the time of plaintiff Klomsten's retirement in October 1994. It was at the same time, October 1994, when the first plaintiffs, Spangler and Klomsten, had actual knowledge of the breach. The other plaintiffs did not learn of the breach until later meetings among the plaintiffs.

Plaintiffs commenced this action in May 1997, two years and seven months, after Altec's failure to pay as promised. Correctly applying the earlier "three year" statute as opposed to the "six year" statute the plaintiffs commenced this action prior to the expiration of the statute of limitations.

The district court's decision that the statute of limitations had run was premised on its finding that "the undisputed facts establish that the last actions constituting the breach occurred in 1985 and 1986, when representatives of defendant Altec told certain plaintiffs that they would not 'lose anything' from their Trane benefits upon transferring. . . ." and that the "alleged misrepresentations all occurred during 1985 and 1986." The district court thus ruled that the six-year statute had run no later than 1992.

The court's application of the period of limitation for filing suit is incorrect. Assuming the 1986 promises were misrepresentations, those promises were not the "last action" constituting part of the breach. The "last action" would have been the payment of the reduced retirement benefit, which would not have occurred until after the employees in

question retired. The payment of the reduced amount occurred less than six years prior to commencement of suit.

The claims under ERISA § 502(a)(1)(B) are even more clearly within the statute of limitations. Recent Seventh Circuit decisions indicate that claims for violation of that section do not even accrue until "benefits were denied." It was only after the employees' retirement occurred that their benefits were actually denied.

Finally, a holding that allows this case to proceed to trial will afford an opportunity for the injustice endured by Plaintiffs to be reversed.

ARGUMENT

I. The ERISA statute of limitations required that plaintiffs commence this action within the earlier of six years after the last action which constituted a part of the breach or violation or three years after the plaintiff had actual knowledge of the breach.

Section 413(a) of ERISA, 29 U.S.C. §1113 (1)(A) allows claims of ERISA fiduciary duty violations to be brought within the earlier of: 1) six years after the last action which constituted a part of the breach or violation; or 2) three years after the plaintiff had actual knowledge of the breach.

Specifically the statute provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under

> this part, or with respect to a violation of this part, after the earlier of - (1) six years after (A) the date of the last action which constituted a part of the breach or violation, (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

For purposes of this appeal fraud or concealment is not an issue.

Case law has interpreted this statute exactly as it reads. "The plaintiff in a suit under ERISA against a fiduciary has six years after the 'breach or violation' in which to sue, or three years after the plaintiff 'had actual knowledge of the breach or violation,' whichever comes first..." *Wolin v. Smith Barney Inc.*, 83 F.3d 847, 850 (7th Cir. 1996), *quoting*, 29 U.S.C. §1113.

Thus the plaintiffs were required to commence this action within six years of the last action constituting Altec's breach of its promise to pay the agreed benefits or within three years of when plaintiffs had actual knowledge of said breach.

II. The 'last action constituting the breach' occurred when Altec denied pension benefits by issuing benefit checks of less than the amount promised in October 1994

The limitation period under the "six year" provision does not begin to run until the 'last action which constituted a part of the breach is complete.

A breach by its very definition requires a failure to perform. The Restatement of Contracts defines a breach as "nonperformance of any contractual duty of immediate performance". Restatement, 1 Contracts, p. 462, ch. 11, sec. 312. Black's defines a breach as failure, without legal excuse, to perform any promise which forms the whole or part of a contract. Blacks Law Dictionary p.188 (6th ed. 1990).

The Seventh Circuit has held that claims for recovery of benefits under §502(a)(1)(B) of ERISA accrue when benefits are denied. *See Tolle v. Caroll Touch, Inc.*, 977 F.2d 1129, 1139 (7th Cir. 1992), (citing *Jenkins v. Local 705 Int'l Bhd of Teamsters Pension Plan*, 713 F.2d 247, 254 (7th Cir. 1983); see also *Benjamin v. Marshall P. Morris, Ltd.*, 1998 WL 299434 *2 (N.D. Ill).

In fact a separate cause of action may arise for each occasion there is a failure to pay. In a case before the Ninth Circuit, plaintiff sued for breach of fiduciary duty when the company she worked for charged employees the same rate for life insurance after the company switched insurance carriers and the cost of the insurance was reduced. The court held that each time the company issued a check of a reduced amount, there was a breach of fiduciary duty, and thus the plaintiff was within the applicable statute of limitations. See *Korchek v. Nichols-Homeshield*, 1997 WL 619869, *3 (N.D.Ill.) See *Meagher v. International Assn. of Machinists and Aerospace Workers Pension Plan*, 856 F.2d 1418, 1423 (9th Cir.1988), cert. denied, 490 U.S. 1039, 109 S.Ct. 1943,

104 L.Ed.2d 414 (1989).

Altec's last action constituting part of the breach of fiduciary duty occurred at the time Altec issued a pension check to Plaintiff Klomsten in an amount less than the promised pension benefit. Therefore, the 'last action which constituted part of the breach' occurred on the date the check was issued in October 1994.

It was not Altec's promises in 1985 and 1986 which were the 'last action[s] which constituted a part of the breach.' The court's application of the period of limitation for filing suit based on the promises in 1985 and 1986 is incorrect.

Assuming the 1985 and 1986 promises were misrepresentations, those promises were not the "last action" constituting part of the breach. Altec's denial of benefits must be regarded as an "action which constituted a part of the breach or violation." The "last action" would have been the payment of the reduced retirement benefit, which would not have occurred until after the employees in question retired. While the 1985 and 1986 promises might have been false or careless, those promises were only part of, but not the "last action" constituting the breach.

It was only after the employees' retirement occurred that their benefits were actually denied. Even the written explanation of benefits Altec relies on would be only a part of the breach, not the last act.

The payment of the reduced amount occurred less than six years prior to commencement of suit. Thus, this action was commenced within six years of the actual denial

of the benefit promised.

III. Plaintiffs' claims are not barred by the statute of limitations, because they commenced this action within the shortest possible limitation period.

As previously noted, the ERISA statute of limitations specifies that the earlier of the six-year or three-year period of limitation applies.

The Seventh Circuit has held that under ERISA, the "statute of limitations for suits against fiduciaries does not begin to run at the time of injury, but instead at the time the prospective plaintiff acquires actual knowledge of the breach of fiduciary obligation." *Wolin*, 83 F.3d at 853.

Further, the Ninth Circuit has interpreted 29 U.S.C. §1113 to mean that the "limitations period in an ERISA action begins to run on the date that the person bringing the suit learns of the breach or violation." *Landwehr v. Dupree*, 72 F.3d 726 (9th Cir. 1995).

29 U.S.C. §1113(2) requires "actual knowledge of the breach or violation." Constructive knowledge or suspicion is an insufficient basis for invoking 29 U.S.C. §1113(2). *See Rush v. Martin Petersen Co.*, 83 F.3d 894, 896 (7th Cir.1996); *Radiology Center, S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1222 (7th Cir.1990).

> "[Actual knowledge] requires a showing that plaintiffs actually knew not only of the events that occurred which constitute the breach or violation but also that those events supported a claim for breach of fiduciary duty or violation under ERISA. Based on

> this test, the Third Circuit held that the defendant fiduciary failed to make the showing of actual knowledge necessary to meet the "stringent requirement" imposed by ERISA §413(2), 29 U.S.C. §1113(2)." *Maher v. Strachan Shipping Co.*, 68 F.3d 951, 954-55 (5th Cir. 1995) (citing *Int. Union v. Murata Erie North America*, 980 F.2d 889, 900-01 (3d Cir.1992)).

In the present case, both injury and 'actual knowledge' occurred simultaneously when Altec denied full benefits to their employees in October 1994. According to the ERISA statute of limitations, the three-year period would run from 1994, and would be earlier than the six-year period. The "three year" statute would thus control.

Plaintiff Klomsten retired in October 1994 and began receiving reduced benefit checks shortly thereafter. The statute of limitations began to run at that time. Suit was filed on May 13, 1997, well before the three-year periods of limitation imposed by the statute.

Defendants contend that even without any knowledge of the fiduciary breach by the Plaintiffs, a six-year statute of limitations would have started to run when the misrepresentations were made. However, these "misrepresentations" were promises when they were first made, and only became misrepresentations when Altec denied full benefits by issuing pension checks for less than the amount promised. In short, a promise, once made, cannot become a misrepresentation until a breach occurs. Therefore, the six-year statute of limitations would run from the time that the promise, through breach, becomes a misrepresentation. As stated above, this did not occur until

October 1994.

Even if the Defendant's notion is assumed, Plaintiffs did not acquire "actual knowledge" until October of 1994. In an appeal from a case filed in 1992 in the Eastern District of Wisconsin in which plaintiff's sole claim was for breach of fiduciary duty based on an oral promise made in 1966, the Seventh Circuit held that ERISA's three-year statute of limitations began to run in 1987 because that was when the plaintiff acquired "actual knowledge" of the breach. See *Rush*, 83 F.3d at 896. The Court of Appeals makes no mention of the fact that more than six years had passed since the 1966 oral promise. *See Id.*

This leads to the obvious inference that it is the "actual knowledge" portion of the ERISA statute of limitations that is more meaningful in evaluating breach of fiduciary duties under ERISA. In *Landwehr*, a claim for misuse of pension funds, the court states that to allow the limitations period to run from the date of breach would be "unfair" and is counter to a "primary purpose of ERISA" in protecting pension funds from unscrupulous persons. *See Landwehr*, 72 F.3d at 733.

The Defendants contend that the Plaintiffs *should* have known, at the time of transferring their employment to Altec, that in the future when the Plaintiffs would eventually retire, their combined Altec and Trane pension benefits would be less than had they worked continuously at Trane over the same time period. For example, Defendants' contention would mean that these blue collar workers should have known that a pension for 30 years of Trane service plus a pension for 10 years of Altec service does not equal 40 years of continuous Trane service. This is not a self-evident

proposition.

IV. Holding that the statute of limitations has run would undermine ERISA and encourage the unscrupulous employer to renege on promises made to employees.

Courts have recognized that the rather extended general limitation period of ERISA was intended to impress upon fiduciaries the importance of the trust they hold. *See Brock v. Nellis*, 809 F.2d 753, 754 (11th Cir.1987). "Congress evidently did not desire that those who violate that trust could easily find refuge in a time bar." *Id.*

A holding that the statute of limitations has run in this case would give employers free reign to lie to employees in order to entice them to work for them. Altec knew it had promised the Plaintiffs that their total pension in the future would keep pace with what they would have had at Trane. Their handwritten notes confirm that.

Conveniently, Altec now seeks to reinterpret their communications by suggesting that all they really meant was that Plaintiffs would not lose their vested benefits at Trane, of which there was never a fear of losing. Rather, Plaintiffs were concerned about continuous employment benefits. Plaintiffs sought, and were given, assurances that their concerns were unfounded, and that they would retire as comfortably and securely as Altec employees as if they were Trane employees. They should not be punished for the unscrupulous behavior of their employer.

In addition, allowing ghastly behavior, like that of Altec places an undue burden upon all employees. The party

with the most immediate control and influence over a pension plan is the employer. The employer ought to have the burden of clearly communicating ongoing developments with the pension plan – not the employee. Supplying convoluted documents (which Plaintiffs deny receiving) to blue-collar workers does not take the fiduciary duty seriously.

It is common sense that the employees would not have transferred had they knew they would receive less retirement income than had they remained with Trane. Altec took great measures to convince Plaintiffs that they would "lose nothing" if they transferred their employment – including attending Union meetings and visiting the plant floor to assure their workers they had nothing to worry about. It would be prudent to expect the same diligence from Altec in expressing their method of calculating benefits. A simple memo does not suffice.

Finally, reversing the decision of the trial court and allowing this claim to proceed to trial will send a clear message to employers that they are to treat their fiduciary duty with utmost respect. It will instill confidence among employees that their employers are accountable for the oral promises they make and, ultimately, will produce better relations between management and workers.

CONCLUSION

The ERISA statute of limitations required that plaintiffs commence an action within the earlier of six years after the last action which constituted a part of the breach or violation or three years after the plaintiffs had actual knowledge of the breach. Altec's failure to pay the benefits

it promised to the plaintiffs was the last action constituting a part of the breach as well as the time when plaintiffs gained actual knowledge of the breach. Plaintiffs commenced this action within three years of Altec's failure to pay. The district court erred in finding the statute of limitations had run prior to suit being filed.

Accordingly, the judgement of the district of court should be vacated and the case remanded for a trial on all claims.

Respectfully submitted,

Kevin C. O'Keefe
Attorney for the Plaintiffs-Appellants

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES SPANGLER
3354 East Avenue South
La Crosse, WI 54601,

DONALD MELCHER
2505 Hoeschler Drive
La Crosse, WI 54601,

WAYNE J. BIELEFELDT
W5410 CTH B
La Crosse, WI 54601,

DALE CHRISTIANSON
N5549 Hole Road
West Salem, WI 54669,

ROBERT CLARK
RR. 3, W5585 #9
La Crosse, WI 54601,

HAROLD DANIELSON
W1526 County Road T
Mindoro, WI 54644,

DENNIS A. GERKE
W4185 Hwy. 33
La Crosse, WI 54601,

AMENDED
COMPLAINT

Civil Action, File No.
97-C-0338-C

DAVID GOODE
608 South 8th
La Crosse, WI 54601,

KEITH HUBER
1507 Viking Avenue
Holmen, WI 54636,

WILLIAM HUTSCHENREUTER
912 South 16th Street
La Crosse, WI 54601,

RAY JANISCH
W5820 Janisch Road
Stoddard, WI 54658,

OSWALD A. KLOMSTEN
825 East 2nd
Trempealeau, WI 54661,

JERRY MUNYON
R #2
Genoa, WI 54632,

EMIL D. POTARACKE
1927 South 21st Terrace
La Crosse, WI 54601,

RODERICK SAND
3027 Scarlett Drive
La Crosse, WI 54601,

GORDON STENSLIEN
903 Birch
Stoddard, WI 54658,

STANLEY STUGEN
428 West Franklin
West Salem, WI 54669,

ROBERT TAYLOR
2513 2nd Avenue East
La Crosse, WI 54601,

Plaintiffs,

vs.

ALTEC INTERNATIONAL LIMITED
PARTNERSHIP, a domestic limited partnership,
2191 Ward Avenue
La Crosse, WI 54601,

CHART INDUSTRIES, INC.,
a Delaware corporation,
35555 Curtis Blvd.
Eastlake, Ohio 44095,

and

ALTEC INTERNATIONAL LIMITED
PARTNERSHIP PENSION PLAN AND
TRUST FOR HOURLY EMPLOYEES,
2191 Ward Avenue
La Crosse, WI 54601,

Defendants.

NATURE OF THE CASE

1. Plaintiffs bring this action alleging violations of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 U.S.C. §1001 *et seq.*, federal common law arising thereunder, and certain state laws. Plaintiffs allege that they were employees of Trane Company prior to 1986, and were induced to accept employment with a spin-off company, ALBRAZE International, Inc., n/k/a ALTEC International Limited Partnership, between 1986 and 1988 inclusive, with the promise that they would continue to receive the same level of benefits as if they had never left employment with Trane Company. As a result of the acts and omissions of the Defendants herein, the Plaintiffs have suffered the loss of pension benefits and health care benefits in violation of ERISA.

JURISDICTION AND VENUE

2. This action is brought pursuant to federal statutes, giving this court jurisdiction over this matter under 29 U.S.C. §1132(f) and 28 U.S.C. §1331. The Court has pendent jurisdiction over the state law claims brought herein under Wisconsin state law.

3. Venue is proper in that Defendants, ALTEC International Limited Partnership, Chart Industries, Inc., and ALTEC International Limited Partnership Pension Plan and Trust for Hourly Employees conduct substantial business in the State of Wisconsin, and the acts constituting the violations of law alleged herein were accomplished through contact with the Plaintiffs in La Crosse County in the Western District of Wisconsin.

JURISDICTIONAL PREREQUISITES

4. At all times relevant hereto, Plaintiffs were employees, participants, and/or beneficiaries covered by the provisions of ERISA.

5. At all times relevant hereto, Defendant, ALTEC International Limited Partnership, was an employer and fiduciary subject to the provisions of ERISA, held a duty to the Plaintiffs to act solely in the interest of the participants and beneficiaries, and was exercising "discretionary authority" respecting the ERISA plan's "management" or "administration" within the meaning of ERISA §3(21)(A).

6. At all times relevant hereto, the ALTEC International Limited Partnership Pension Plan and Trust for Hourly Employees was an employee pension benefit plan governed by ERISA.

7. This action is a civil action where issues of law and fact herein involve a federal question under the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 U.S.C. §1001 *et seq.*

PARTIES

8. Plaintiff, James Spangler, was at all times relevant to this Complaint, an adult individual residing at 3354 East Avenue South, La Crosse, Wisconsin.

9. Plaintiff, Harold Danielson, was at all times relevant to this Complaint, an adult individual residing at W1526 County Road T, Mindoro, Wisconsin.

10. Plaintiff, Donald Melcher, was at all times

relevant to this Complaint, an adult individual residing at 2505 Hoeschler Drive, La Crosse, Wisconsin.

11. Plaintiff, Ray Janisch, was at all times relevant to this Complaint, an adult individual residing at W5820 Janisch Road, Stoddard, Wisconsin.

12. Plaintiff, Wayne Bielefeldt, was at all times relevant to this Complaint, an adult individual residing at W5410 CTH B, La Crosse, Wisconsin.

13. Plaintiff, Keith Huber, was at all times relevant to this Complaint, an adult individual residing at 1507 Viking Avenue, Holmen, Wisconsin.

14. Plaintiff, Emil Potaracke, was at all times relevant to this Complaint, an adult individual residing at 1927 South 21st Terrace, La Crosse, Wisconsin.

15. Plaintiff, William Hutschenreuter, was at all times relevant to this Complaint, an adult individual residing at 912 South 16th Street, La Crosse, Wisconsin.

16. Plaintiff, Roderick Sand, was at all times relevant to this Complaint, an adult individual residing at 3027 Scarlett Drive, La Crosse, Wisconsin.

17. Plaintiff, Gordon Stenslien, was at all times relevant to this Complaint, an adult individual residing at 300 Elm Drive, Stoddard, Wisconsin.

18. Plaintiff, Robert Clark, was at all times relevant to this Complaint, an adult individual residing at RR 3, W5585 #9, La Crosse, Wisconsin.

19. Plaintiff, Robert Taylor, was at all times relevant to this Complaint, an adult individual residing at 2513 Second Avenue East, La Crosse, Wisconsin.

20. Plaintiff, Dale Christianson, was at all times relevant to this Complaint, an adult individual residing at N5549 Hole Road, West Salem, Wisconsin.

21. Plaintiff, David Goode, was at all times relevant to this Complaint, an adult individual residing at 608 South 8th, La Crosse, Wisconsin.

22. Plaintiff, Dennis Gerke, was at all times relevant to this Complaint, an adult individual residing at W4185 Highway 33, La Crosse, Wisconsin.

23. Plaintiff, Jerry Munyon, was at all times relevant to this Complaint, an adult individual residing at Route 2, Genoa, Wisconsin.

24. Plaintiff, Stanley Stugen, was at all times relevant to this Complaint, an adult individual residing at 428 West Franklin, West Salem, Wisconsin.

25. Plaintiff, Oswald Klomsten, was at all times relevant to this Complaint, an adult individual residing at 825 East Second, Trempealeau, Wisconsin.

26. Upon information and belief, Defendant, ALTEC International Limited Partnership, f/k/a ALTEC International, Inc., f/k/a ALBRAZE International, Inc. (hereinafter "ALTEC"), is a Delaware limited partnership having its principal place of business at 2191 Ward Avenue, La Crosse, Wisconsin 54601.

27. Upon information and belief, Defendant, Chart Industries, Inc. (hereinafter "Chart"), is a Delaware corporation having its principal place of business at 35555 Curtis Blvd., Eastlake, Ohio 44095.

28. Upon information and belief, Chart is a general partner of ALTEC, and/or Chart has substantially the same identity as ALTEC and/or exercised complete domination and control of the policy, business practices, and finances of ALTEC to such an extent that the entity of ALTEC had no separate mind, will or existence of its own, and/or ALTEC was undercapitalized, and as such, Chart as a general partner or parent/successor corporation is liable for the acts and omissions of ALTEC as set forth herein.

29. Upon information and belief, Defendant, ALTEC International Limited Partnership Pension Plan and Trust for Hourly Employees (hereinafter "ALTEC Plan"), is, and at all times relevant hereto was, an employee pension benefit plan as defined under Section 3(2) of ERISA, having its principal place of business at 2191 Ward Avenue, La Crosse, Wisconsin 54601. The registered agent for the ALTEC Plan is The Plan Administrator, ALTEC International Limited Partnership, 2191 Ward Avenue, La Crosse, Wisconsin 54601.

30. Defendant ALTEC is an employer within the meaning of Section 3(5) of ERISA, a plan sponsor as defined under Section 3(16)(B) of ERISA, and held a fiduciary duty to the Plaintiffs, and was exercising "discretionary authority" respecting the Plan's "management" or "administration" within the meaning of ERISA §3(21)(A) in general and specifically in regard to the representations made to Plaintiffs about the benefits they would receive upon accepting

employment at ALTEC as set forth below.

FACTS

31. On or about January 8, 1957, the Plaintiff, James Spangler, began his employment with the Trane Company. While employed there, James Spangler was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

32. In or about 1953, the Plaintiff, Donald Melcher, began his employment with the Trane Company. While employed there, Donald Melcher was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

33. On or about October 11, 1955, the Plaintiff, Wayne Bielefeldt, began his employment with the Trane Company. While employed there, Wayne Bielefeldt was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

34. On or about April, 1980, the Plaintiff, Dale Christianson, began his employment with the Trane Company. While employed there, Dale Christianson was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical

Benefit Plan, and the Trane Company Dental Care Plan.

35. On or about November, 1969, the Plaintiff, Robert Clark, began his employment with the Trane Company. While employed there, Robert Clark was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

36. On or about December 1, 1951, the Plaintiff, Harold Danielson, began his employment with the Trane Company. While employed there, Harold Danielson was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

37. On or about February 11, 1974, the Plaintiff, Dennis Gerke, began his employment with the Trane Company. While employed there, Dennis Gerke was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

38. On or about May 23, 1973, the Plaintiff, David Goode, began his employment with the Trane Company. While employed there, David Goode was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

39. On or about February 4, 1974, the Plaintiff, Keith Huber, began his employment with the Trane Company. While employed there, Keith Huber was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

40. In or about 1954, the Plaintiff, William Hutschenreuter, began his employment with the Trane Company. While employed there, William Hutschenreuter was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

41. On or about July 30, 1951, the Plaintiff, Ray Janisch, began his employment with the Trane Company. While employed there, Ray Janisch was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

42. In or about 1950, the Plaintiff, Oswald Klomsten, began his employment with the Trane Company. While employed there, Oswald Klomsten was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

43. On or about May 10, 1960, the Plaintiff, Jerry

Munyon began his employment with the Trane Company. While employed there, Jerry Munyon was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

44. In or about 1950, the Plaintiff, Emil Potaracke, began his employment with the Trane Company. While employed there, Emil Potaracke was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

45. On or about June 22, 1960, the Plaintiff, Roderick Sand, began his employment with the Trane Company. While employed there, Roderick Sand was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

46. On or about June 13, 1960, the Plaintiff, Gordon Stenslien, began his employment with the Trane Company. While employed there, Gordon Stenslien was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

47. In or about 1956, the Plaintiff, Stanley Stugen, began his employment with the Trane Company. While employed there, Stanley Stugen was eligible for, and

participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

48. In or about April, 1964, the Plaintiff, Robert Taylor, began his employment with the Trane Company. While employed there, Robert Taylor was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

49. Plaintiffs were employees of Trane Company prior to 1986. When plans were made for a spin-off company, ALTEC, to be formed and purchased by Arthur Holmes and/or Chart Industries, Inc., Plaintiffs were told in meetings that their skills and experience were so essential to the survival of ALTEC that unless they accepted employment with ALTEC, the company would not be viable and Arthur Holmes and/or Chart Industries, Inc., would not purchase ALTEC. Plaintiffs were induced to accept employment with ALTEC between 1986 and 1988 inclusive, with the promise by ALTEC that they would continue to receive the same level of benefits as if they had never left employment with Trane.

50. The representations of ALTEC, which were made in a fiduciary capacity, were untrue.

51. Upon information and belief, ALTEC made these untrue statements with the intent to induce and deceive Plaintiffs, and/or wantonly in reckless disregard of Plaintiffs' rights.

52. In reliance upon the representations regarding the benefits they would receive in accepting employment with ALTEC, Plaintiffs quit their employment at Trane and accepted employment with ALTEC.

53. As a result of the acts and omissions of the Defendants herein, the Plaintiffs have suffered the loss of pension, health care, life insurance, and vacation benefits.

CLAIM I
(ERISA §502(a)(3) - Breach of Fiduciary Duty)

54. Plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1 through 53 above, inclusive, with the same force and effect as though fully set forth and repeated herein.

55. Defendants, by inducing Plaintiffs to leave their employment with Trane to accept employment with ALTEC and in failing to provide benefits promised to Plaintiffs, breached their fiduciary obligations under ERISA §404 and otherwise violated the terms of ERISA.

56. As a direct and proximate result of Defendants' acts and omissions as set forth herein, which acts and omissions Plaintiffs first had actual knowledge of in or around 1995, Plaintiffs have suffered a loss of pension, health care, life insurance, and vacation benefits and/or have been forced to continue employment to maintain benefits which were otherwise due to them, and Plaintiffs have incurred other pecuniary losses, costs and attorneys fees.

CLAIM II
(ERISA §502(a)(1)(B) -

Declare & Enforce Rights Under Plan)

57. Plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1 through 56 above, inclusive, with the same force and effect as though fully set forth and repeated herein.

58. Plaintiffs were entitled to certain rights and benefits under The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan, and would have retained such rights and benefits but for the representations of ALTEC.

59. Plaintiffs are now entitled to certain rights and benefits under the ALTEC Plans.

60. Defendants have wrongly denied rights and benefits to Plaintiffs under such plans, and any further efforts to receive such rights and benefits have been futile.

61. As a direct and proximate result of Defendants' acts and omissions as set forth herein, which acts and omissions Plaintiffs first had actual knowledge of in or around 1995, Plaintiffs have suffered a loss of pension, health care, life insurance, and vacation benefits and/or have been forced to continue employment to maintain benefits which were otherwise due to them, and Plaintiffs have incurred other pecuniary losses, costs and attorneys fees.

CLAIM III
(ERISA Federal Common Law - Estoppel)

62. Plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1 through 61 above, inclusive, with the same force and effect as though fully set forth and repeated herein.

63. ALTEC misrepresented material facts regarding the benefits available to Plaintiffs upon quitting employment at Trane and accepting employment at ALTEC.

64. ALTEC was aware that its representations to Plaintiffs were untrue.

65. ALTEC intended that the misrepresentations be acted on by Plaintiffs and/or had reason to believe Plaintiffs would rely on the misrepresentations.

66. Plaintiffs did not know, and had no reason to know, that the representations of ALTEC were untrue.

67. Plaintiffs reasonably and detrimentally relied on the misrepresentations of ALTEC.

68. As a direct and proximate result of Defendants' acts and omissions as set forth herein, which acts and omissions Plaintiffs first had actual knowledge of in or around 1995, Plaintiffs have suffered a loss of pension, health care, life insurance, and vacation benefits and/or have been forced to continue employment to maintain benefits which were otherwise due to them, and Plaintiffs have incurred other pecuniary losses, costs and attorneys fees.

CLAIM IV
(Fraudulent Representations - Wis. Stat. §100.18)

69. Plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1 through 68 above, inclusive, with the same force and effect as though fully set forth and repeated herein.

70. Upon information and belief, Defendant, ALTEC, directly and positively represented to Plaintiffs and other members of the public, orally and by way of written materials, that in the event Plaintiffs would quit their employment with Trane and accept employment at ALTEC, Plaintiffs would continue to receive the same level of benefits as if they had never left employment with Trane Company.

71. ALTEC made the aforementioned statements with the intent to induce a contract with respect to employing Plaintiffs.

72. The statements were untrue, misleading and/or deceptive.

73. The aforementioned acts and omissions of ALTEC constitute fraudulent representations as is defined in Wis. Stat. §100.18.

74. As a direct and proximate result of ALTEC's fraudulent representations, which acts and omissions Plaintiffs first had actual knowledge of in or around 1995, Plaintiffs have suffered pecuniary loss as set forth above plus costs including reasonable attorneys' fees as provided for by Wis. Stat. §100.18(11)(b)2, in a sum sufficient to confer jurisdiction upon this Court.

CLAIM V

(Breach of Contract)

75. Plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1 through 74 above, inclusive, with the same force and effect as though fully set forth and repeated herein.

76. ALTEC offered and agreed that in the event Plaintiffs would quit their employment with Trane and accept employment at ALTEC, Plaintiffs would continue to receive the same level of benefits as if they had never left employment with Trane, including but not limited to, the same level of vacation benefits.

77. Plaintiffs accepted said offer, and said agreement was made with sufficient consideration.

78. Plaintiffs have performed all of the terms and conditions by them to be performed.

79. ALTEC has materially breached said agreement and has violated Wisconsin Statute §109.03, in that it has failed and refused to provide the benefits which it agreed to provide to Plaintiffs, including but not limited to, the same level of vacation benefits.

80. As a direct and proximate result of ALTEC's breach of contract and violation of Wisconsin Statute §109.03, Plaintiffs have sustained damages as heretofore alleged in a sum sufficient to confer jurisdiction on this Court.

CLAIM VI
(INTENTIONAL MISREPRESENTATION)

81. Plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1 through 80 above, inclusive, with the same force and effect as though fully set forth and repeated herein.

82. Upon information and belief, Defendant, ALTEC, directly and positively represented to Plaintiffs and other members of the public, orally and by way of written materials, that in the event Plaintiffs would quit their employment with Trane and accept employment at ALTEC, Plaintiffs would continue to receive the same level of benefits as if they had never left employment with Trane Company.

83. That the representations made by ALTEC were untrue.

84. Upon information and belief, ALTEC either knew such statements to be false, or spoke with reckless disregard as to whether its statements were true or false.

85. Upon information and belief, the representations were made by ALTEC knowing it had no sufficient basis or information to justify such statements in order to induce Plaintiffs to quit their employment with Trane and accept employment at ALTEC.

86. That as a direct and proximate result of the intentional misrepresentations made by ALTEC, which acts and omissions Plaintiffs first had actual knowledge of in or around 1995, Plaintiffs have sustained damages as heretofore alleged in a sum sufficient to confer jurisdiction on this Court.

CLAIM VII

(NEGLIGENT MISREPRESENTATION)

87. Plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1 through 86 above, inclusive, with the same force and effect as though fully set forth and repeated herein.

88. Upon information and belief, ALTEC did not exercise reasonable care in ascertaining the facts regarding the benefits it would provide to Plaintiffs and in conveying information concerning the benefits to the Plaintiffs.

89. That the representations made by ALTEC were untrue.

90. As a direct and proximate result of ALTEC's negligent misrepresentations, which acts and omissions Plaintiffs first had actual knowledge of in or around 1995, Plaintiffs have sustained damages as heretofore alleged in a sum sufficient to confer jurisdiction on this Court.

CLAIM VIII
(STRICT RESPONSIBILITY MISREPRESENTATION)

91. Plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1 through 90 above, inclusive, with the same force and effect as though fully set forth and repeated herein.

92. Upon information and belief, ALTEC made representations of fact that in the event Plaintiffs would quit their employment with Trane and accept employment at ALTEC, Plaintiffs would continue to receive the same level of benefits as if they had never left employment with Trane.

93. Such representations of fact were untrue.

94. Upon information and belief, ALTEC made such representations of fact based upon personal knowledge or in circumstances in which it necessarily ought to have known the untruth of the representations.

95. ALTEC had an economic interest in getting Plaintiffs to accept employment with ALTEC.

96. Plaintiffs believed the representations made by ALTEC concerning benefits and relied upon said representations.

97. As a direct and proximate result of ALTEC's misrepresentations, which acts and omissions Plaintiffs first had actual knowledge of in or around 1995, Plaintiffs have sustained damages as heretofore alleged in a sum sufficient to confer jurisdiction on this Court.

WHEREFORE, Plaintiffs demand the following:

A. Compensatory damages, together with interest on said sum;

B. In the event the court does not award compensatory damages, injunctive relief and restoration of the benefits promised by the Defendants;

C. Punitive damages, together with interest on said sum;

D. Costs, disbursements, and reasonable attorney's fees of this action;

E. Any other just and equitable relief as the Court may deem fit.

TWELVE PERSON JURY TRIAL REQUESTED ON CLAIMS IV - VIII.

Dated this 2nd day of October, 1997.

O'KEEFE JACOBSON
TRIAL LAWYERS S.C.

BY:_____

Jeffrey L. London
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
29th Floor
Chicago, IL 60606
(312) 207-1000
Co-counsel for Plaintiffs

Kevin C. O'Keefe
Timothy S. Jacobson
Attorneys for Plaintiffs
First Bank Place
First Floor
201 Main Street
La Crosse, WI 54601-3298
(608) 784-8900

APPENDIX H

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
APPEAL NO. 98-2437**

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF WISCONSIN
CASE NO.: 97 C 0338 C**

**JAMES SPANGLER ET AL.,
PLAINTIFFS-APPELLANTS,**

VS.

**ALTEC INTERNATIONAL LIMITED
PARTNERSHIP ET AL.,
DEFENDANTS-APPELLEES.**

**BRIEF OF DEFENDANTS-APPELLEES
CHART INDUSTRIES, INC., ALTEC
INTERNATIONAL LIMITED PARTNERSHIP, AND
ALTEC INTERNATIONAL LIMITED PARTNERSHIP
PENSION PLAN AND TRUST FOR HOURLY
EMPLOYEES**

BRENT P. SMITH
(WIS 1018367)
JOHNS & FLAHERTY S.C.
205 Fifth Avenue South
Suite 600
P.O. Box 1626
La Crosse, WI 54601
(608) 784-5678

Attorneys for Defendants-Appellees ALTEC International Limited Partnership and ALTEC International Limited Partnership Pension Plan and Trust for Hourly Employees

MITCHELL G. BLAIR
(OH 0010892)
DEBORAH S. COUSINS
(OH 0063155)
CALFEE, HALTER & GRISWOLD LLP
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, OH 44114-2688
(216) 622-8200

Attorneys for Defendant-Appellee Chart Industries, Inc.

3. The Employees Were Given Numerous Documents Regarding ALTEC's Benefits Program

The employees were never told ALTEC would pay them the difference between the pension multiplier when they left Trane and ALTEC's multiplier. Moreover, after ALTEC's acquisition of the Trane Plant, the Employees were given numerous documents over the years that detailed the exact scope of ALTEC's benefits program. For example, in February of 1986, ALBRAZE published a Benefits Highlights booklet for the hourly Union employees. (See Deposition Exhibit No. 6, ALBRAZE International Benefits Highlights (Hourly Union) (Feb. 1986), Supp. App. At 98-128.)[4] This document clearly states that ALBRAZE Pension Plan benefits were based upon years of service with ALBRAZE.

Pension benefit at age 65	your monthly pension benefit will be $17 *times your years of service with ALBRAZE*

(Id. at 7 (emphasis added).)

The February 1986 Benefits Highlights booklet was distributed to all of the ALBRAZE hourly Union employees. (See Affidavit of George Snapp ¶ 6, Supp. App. at 96.) Some of the Employees actually admitted that they received

---

[4]The Employees' version of this document, found at pages 40-60 of their Appendix, conveniently omits the cited pages. A true and correct copy of Deposition Exhibit 6 is included in Appellees' Supplemental Appendix.

this document. (See, e.g., Plaintiff Robert Clark's Responses to ALTEC's Discovery, Request for Admission No. 11, Supp. App. at 4.) Others did not recall receiving the benefits booklet. (See, e.g., Plaintiff Keith Huber's Responses to Defendant ALTEC's Discovery, Request for Admission No. 11, Supp. App. at 10.) Still others denied that they ever received such a booklet. (See, e.g., Plaintiff David Goode's Responses to ALTEC's Discovery, Request for Admission No. 11, Supp. App. at 16.)

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JAMES SPANGLER, DONALD MELCHER,
WAYNE J. BIELEFELDT, ET AL.,

Petitioners-
Plaintiffs-Appellants,

v.Appeal No. 98-2437

ALTEC INTERNATIONAL LIMITED
PARTNERSHIP, CHART INDUSTRIES,
INC. and ALTEC INTERNATIONAL
LIMITED PARTNERSHIP PENSION PLAN
AND TRUST FOR HOURLY EMPLOYEES,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin
Case No. 97 C 0338 C
The Honorable Barbara B. Crabb, Presiding

PETITION FOR REHEARING

(Tables omitted)

Petitioners-Plaintiffs-Appellants hereby petition that their appeal be reheard pursuant to Fed. R. App. P. 40 on the grounds that there are points of law and fact which the court has overlooked and misapprehended within the meaning of Fed. R. App. P. 40. The basis for this petition will be set forth more fully in the remainder of this petition.

PROOFS AND POINTS OF FACT AND LAW APPARENTLY OVERLOOKED OR MISAPPREHENDED BY THE COURT

1. The court has overlooked and misapprehended the facts of record which support Petitioners-Plaintiffs-Appellants' position herein. Without question, for purposes of this appeal, the record does support the Petitioners-Plaintiffs-Appellants employees' position and argument that in 1985 and 1986 Altec represented and assured the employees that they would not lose any Trane Company benefits if they transferred to Altec. Altec officials represented that the employees' benefits would not change from the Trane Company benefits.

Altec, also, did, in 1986, distribute documents to the employees that showed Altec employee benefit calculations; nevertheless, these documents, in no manner whatsoever indicated that the benefit calculations and information in the documents applied to the former Trane employees. Based upon the representations made by Altec, Petitioners-Plaintiffs-Appellants employees had absolutely no reason to believe that the pension calculations in the documents served any purpose other than as a comparison between what non-former Trane employees would receive versus what the

Trane employees would receive from Altec. Nothing in these documents therefore gave the former Trane Company employees any reason to believe that their benefits would be anything other than as had been represented by the Altec officials in 1985 and 1986.

Because of what the Petitioners-Plaintiffs-Appellants were told, there are issues of fact on whether the Petitioners-Plaintiffs-Appellants reasonably believed the written documents did not apply to them, a special group being persuaded to join Altec. Since the Petitioners-Plaintiffs-Appellants constituted this special group, there was not a conflict between what they were promised and the written plan covering employees who were not part of that special group. The Court's finding there was a conflict indicates the Court overlooked the special status the Petitioners-Plaintiffs-Appellants reasonably believed they would enjoy.

Accordingly, the Court of Appeals, in its subject decision on page 2, misapprehends the facts when it states that "In 1986, Altec distributed documents to its employees (including those formerly employed by Trane) detailing how their pension benefits would be calculated, which made clear that only years worked for Altec would be used in calculating pension benefits." When the facts are viewed most favorably toward Petitioners-Plaintiffs-Appellants herein, that is not a finding of fact that should be drawn from the record.

The documents provided did not conflict with Petitioners-Plaintiffs-Appellants' understanding of what their rights would be and did not conflict with the representations of the Altec officials. Petitioners-Plaintiffs-Appellants believed that the documents provided a comparison of what

non Trane Company Altec employees would receive vis-a-vis what the former Trane Company employees would receive from Altec. Thus, the oral representations did not conflict with the plan, so that the factual assumptions made by the Court as quoted above is a misapprehension of the facts.

2. Under the applicable law, the Court of Appeals has mistakenly misapprehended a *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1965 (1996) breach of fiduciary duty cause of action as akin to an intentional misrepresentation cause of action. However, the present case is not, per se, an intentional misrepresentation cause of action. Neither *Varity*, supra., nor any other known case has limited such breaches of fiduciary duty claims to intentional misrepresentation claims. For that matter, neither does Defendants-Appellees' Brief.

It is factually correct that the subject claims are predicated upon the fact that representations were made in 1985 and 1986 as to what the nature and extent of the benefits that the Trane Company employees would receive if they transferred to Altec. However, it was not until when it came time to first perform in accordance with those representations, that Defendants-Appellees first failed to perform in accordance with their prior representations. Only then could Altec have breached its fiduciary duties to perform in accordance with its prior representations. The 1985 and 1986 representations created the fiduciary duties to perform. These duties were not breached until there was the failure to perform. Petitioners-Plaintiffs-Appellants respectfully submit that under the existing case law, including *Varity*, this, is the only reasonable way to construe when a *Varity* breach occurred herein. The Argument as

hereinafter set forth will more fully discuss this point. Therefore, to view the claimed breach of fiduciary duty as analogous to an intentional misrepresentation misapprehends when the fiduciary duty breach occurred in this case.

3. Finally, based upon the facts of record construed most favorably in support of the Petitioners-Plaintiffs-Appellants herein, the Court of Appeals has apparently overlooked the effect and ramifications of this holding. The subject representations made by Altec officials to Petitioners-Plaintiffs-Appellants were made in 1985 and 1986. Petitioners-Plaintiffs-Appellants, thereafter had no knowledge or notice whatsoever of any breach or failure to perform in accordance with promises until late 1994. Therefore, under the Court of Appeals' analysis in its decision, Petitioners-Plaintiffs-Appellants' cause of action ran in 1992; however, this 1992 date is over two years before any Petitioner-Plaintiff-Appellant had any indication whatsoever that there had been or would possibly be any breach of any duty by Altec. Under the Court of Appeal's decision, nevertheless, the Petitioners-Plaintiffs-Appellants lost a right to bring this action before they had any basis to conclude that such a right existed. The ramification this has for the litigants herein and future litigants if this is in fact how a *Varity* breach is interpreted, has potentially extreme inequitable ramifications and will cause extreme unfairness in contravention of ERISA policy.

ARGUMENT

I. THE COURT MISAPPREHENDS PETITIONERS-PLAINTIFFS-APPELLANTS' BREACH OF FIDUCIARY DUTY CAUSE OF ACTION AGAINST DEFENDANTS-

APPELLEES AS A MISREPRESENTATION CAUSE OF ACTION. THUS, THE COURT ERRONEOUSLY CONCLUDES THAT THE BREACH OCCURRED AT THE TIME PETITIONERS-PLAINTIFFS-APPELLANTS ACTED IN RELIANCE UPON ALTEC'S REPRESENTATIONS.

As has been repeatedly noted, Petitioners-Plaintiffs-Appellants contend that in 1985 and 1986 Altec officials made specific representations to the Petitioners-Plaintiffs-Appellants as to the nature and extent of what their pension benefits would be if the employees joined Altec. However, the breach of fiduciary duty cause of action does not depend on whether or not the representations made at that time were intended to be misrepresentations. Whether there were misrepresentations or representations in 1985 and 1986 is not material to any issue before the Court. The material issue is that these representations created a fiduciary duty on the part of Altec to abide by and act in accordance with the representations made. For this reason, there can be no breach of that fiduciary duty until Altec, in fact, failed to perform in accordance with the promises made. This, clearly the record shows, did not occur until 1994.

Similarly, Petitioners-Plaintiffs-Appellants therefore do not contend the oral promises conflicted with the written documents. The written documents do not apply to Petitioners-Plaintiffs-Appellants. In fact, Petitioners-Plaintiffs-Appellants submit that the case law including *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996) supports Petitioners-Plaintiffs-Appellants' arguments herein and that the Court has misapprehended the law as set forth in *Varity*. In discussing

the breach of fiduciary duty cause of action that the Plaintiffs in *Varity* pursued vis-a-vis the remedies available to the Plaintiffs, the Supreme Court in *Varity* specifically characterized "a denial of benefits as a breach of fiduciary duty," see *Varity* at 516 U.S. 514, 116 S.Ct. 1079. This language was overlooked by this Court.

From the above *Varity* quote, it is evident that the Supreme Court also recognized that the breach of fiduciary duty occurs when the denial of benefits occurs, **not** when the representations were first made.

To further understand this logic, consider the following hypothetical. Assume that in 1985 and 1986 the oral representations had been reduced formally to a written plan that was then given to the employees. Further assume that Altec, in 1994, began to pay benefits that conflicted with the written plan.

Presumably, in such a case, the Court of Appeals would consider that in a breach of fiduciary duty claim, the cause of action would occur when the failure to perform occurred. The plan created the duty, and the duty was breached when there was a failure to perform. The Petitioners-Plaintiffs-Appellants' cause of action, herein, is not substantially different from this hypothetical.

The Court of Appeals in *Meagher v. International Association of Machinists and Aerospace Workers Pension Plan*, 856 F.2d 1418 (9th Cir. 1988) has applied similar logic. This case also addressed the application of the statute of limitations to a breach of fiduciary duty cause of action under ERISA; in doing so, *Meagher* held that the six-year statute of limitations provision pursuant to 29 U.S.C. §1113

began to accrue with the issuance of each check that was not in accordance with the benefits to which the Plaintiff was entitled. "Thus, the issuance of each check commenced a six-year period. . ." See *Meagher* at 856 F.2d 1418, 1423. For similar holdings see also *Tolle v. Carroll Touch, Incorporated*, 977 F.2d 1129, 1139 (7th Cir. 1992).

In addition, the following quote from *Starr v. JCI Data Processing, Inc.*, 767 F.Supp. 633, 637-638 (N.J. 1991) is also in accord with the above discussed holdings and logic:

> In the absence of actual knowledge, § 1113 mandates application of a limitations period of six years after the date of the last action constituting part of the breach or, in the case of omission, the latest date on which the fiduciary could have cured the breach or violation. (For applications see, e.g., Davidson v. Cook, 567 F.Supp. 225, 234 (E.D.Va.1983), aff'd, 734 F.2d 10 (4th Cir.1984), cert. denied, Accardi v. Davidson, 469 U.S. 899, 105 S.Ct. 275, 83, L.Ed.2d 211 (1984) (last action was last disbursement of funds pursuant to loans made not in interest of plan beneficiaries); Buccino v. Continental Assur. Co., 578 F.Supp. 1518, 1521 (S.D.N.Y.1983) (last action was last time fund was injured by making premium payment due to fiduciaries' failure to advise fund to divest itself of unlawful or imprudent investments).) This language is unusually broad in allowing employees to pursue their claims in a timely fashion while hampering an employer's effort to hide behind a time bar. Thus, the language

> comports with Congress' intent in ERISA " 'to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective ... recovery of benefits due to participants.' " S.REP. NO. 127, 93d Cong., 1st Sess. 35 (1973), quoted in Connors v. Hallmark & Son Coal Co., 935 F.2d 336 (D.C.Cir.1991).

Petitioners-Plaintiffs-Appellants acknowledge that their breach of fiduciary duty cause of action is a tort. However, that does not change the fact that under a *Varity* type of breach of fiduciary duty cause of action that the breach occurred when there was a failure to perform, which is also, in this case, when the harm occurred. In the Wisconsin Supreme Court case of *Pritzlaff v. Arch Diocese of Milwaukee*, 194 Wis.2d 302, 315, 533 N.W.2d 780, 785 (1995) which discussed generally when tort causes of action accrue, the following was saliently stated:

> [5] [6] [7] It is well settled that a cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it. *Meracle v. Children's Serv. Socy.*, 149 Wis.2d 19, 437 N.D.2d 532 (1989); *Barry v. Minahan*, 127 Wis. 570, 573, 107 N.W. 488 (1906). A party has a present right to enforce a claim when the plaintiff has suffered actual damage, defined as harm that has already occurred or is reasonably certain to occur in the future.

This is a general principle that applies to the issue of

when all tort actions accrue; it is therefore equally applicable to the tort cause of action that Petitioners-Plaintiffs-Appellants allege in the present case. This is, and has been, Petitioners-Plaintiffs-Appellants' argument in this case as to when the cause of action accrued. Thus, Petitioners-Plaintiffs-Appellants respectfully submit that the Court of Appeals has misapprehended the applicable facts and the law of this case by concluding that the six-year statute of limitations under 29 U.S.C. §1113 began to run at the time the representations were made in 1986 or when the Petitioners-Plaintiffs-Appellants acted in reliance on these representations. The statute of limitations did not, and could not, begin to run until there was the "denial of the benefits" (see *Varity*, supra.). This did not occur until 1994.

II. THE COURT'S DECISION APPARENTLY OVERLOOKS THE INEQUITABLE AND UNFAIR EFFECT AND RAMIFICATIONS ITS HOLDING HAS UPON PETITIONERS-PLAINTIFFS-APPELLANTS HEREIN AND OTHER LITIGANTS WHO MIGHT BE THE VICTIM OF *VARITY* BREACH OF FIDUCIARY DUTY CLAIMS.

As noted in *Starr v. JCI Data Processing, Inc.* at 767 F.Supp. 633, 638: "... Congress' intent in ERISA "[is] 'to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective ... recovery of benefits due to participants.' " S.REP. NO. 127, 93d Cong., 1st Sess. 35 (1973), quoted in Connors v. Hallmark & Son Coal Co., 935 F.2d 336 (D.C.Cir.1991)."

From this, it is clear that one policy goal of ERISA is to remove the hurdles that have prevented employee and

benefit plan litigants from enforcing their rights to pension and other benefits.

Petitioners-Plaintiffs-Appellants respectfully submit that in view of this set forth policy, the ultimate effect of the Court's decision in this case is to permit employers and benefit plan administrators to make representations and promises to employees and plan participants as to the nature and extent of benefits and yet not abide by those promises if six years pass and if in the interim, the employees could not learn that there will not be performance in accordance with the representations made. Under the Court's holding, if six years have passed since the time of the representations, regardless of the circumstances, the participants, the innocent victims, would be left with no recourse despite the fact that they had no knowledge until the time the benefits actually accrued and performance was required. The effect is that the plan participants such as the Petitioners-Plaintiffs-Appellants in the present case have lost their rights to bring an action categorically before they even knew that there was a right to pursue. It is submitted that this is in direct contravention of the above espoused ERISA policy.

This holding therefore has potentially momentous ramifications, not only to the parties in the present case, but to any and all other plan participants who might be victims of *Varity* type breaches of fiduciary duties. Again, in the present case, the fact is that if the Court of Appeals decision stands, the parties are left in a circumstance where representations were made in 1985 and 1986. The earliest any participant was aware that any wrong had, or would, occur to them in violation of Altec's fiduciary duties to Petitioners-Plaintiffs-Appellants was in 1994. If they were not aware of the wrong that occurred, they surely would not

be aware that there was any basis to bring any type of claim whatsoever to enforce their rights. Thus, effectively what has transpired, if this decision is not reheard and reconsidered, would be that the subject employees lost their rights to bring this action before there was any knowledge whatsoever that such a right existed. The patent unfairness and inequity of this cannot be understated. This is particularly true in view of the policy provisions as is set forth above.

In view of this fact also, it is respectfully submitted that the Court of Appeals rehear the subject claims of the Petitioners-Plaintiffs-Appellants herein. The ramifications and extent of this holding have been apparently overlooked by the Court.

CONCLUSION

It is respectfully submitted that both the District Court, and the Court of Appeals have apparently overlooked and misapprehended the applicable facts and law in the present case and have not fully considered the ramifications of the decision in view of the facts. For these reasons, it is requested that this Petition for Rehearing be granted.

Respectfully submitted,

Kevin C. O'Keefe
Attorney for the
Petitioners-Plaintiffs-
Appellants

PRAIRIE GROUP TRIAL LAWYERS S.C.
201 Main Street
U.S. Bank Place, First Floor
La Crosse, WI 54601-3298
(608) 784-8900

Kenan Kersten
KERSTEN & MCKINNON, S.C.
231 West Wisconsin Ave.
Suite 1200
Milwaukee, WI 53203
(414) 271-0054

Jeffrey L. London
SACHNOFF & WEAVER, LTD.
30 South Wacker Dr.
29th Floor
Chicago, IL 60606
(312) 207-1000